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II

PRELIMINARY DISCUSSIONS ON THE FORM OF THE NEW CONSTITUTION

THE break-up of the Empire necessitated a radical alteration of the pre-war Austrian constitution, the pivot of which had been the Imperial House. The chief object of Habsburg policy had been to manipulate the rival national and social forces within the State in order to ensure the predominance of Imperial influence. Therefore, with the collapse of the Monarchy and the falling away of the non-German elements, German Austria was confronted with the task of building up a new national State, which was necessarily different, in both its forms and its aims, from that which had preceded it.

Because of the general feeling that the reintroduction of any form of autocratic government, however convenient this might be in a period of emergency, must be avoided at all costs, the governmental devices made use of by the German Austrians from October 1918 to the promulgation of the constitution of October 1920[1] were marked by a desire to safeguard the position of the National Assembly as the supreme legislative organ.[2] All parties were agreed, though their fervour varied, that the new State must be a democratic one.

The stress on the importance of the Lower House was also partly a consequence of the political philosophy of the Social Democrats, whose views were then in the ascendant. This party laid great emphasis on the necessity for concentrating power in one democratically elected Chamber, and viewed with suspicion attempts on the part of that Chamber to delegate any considerable part of its authority to bodies not directly

[1] For an analysis of the Constitutions of 30 October and 19 December 1918 and 14 March 1919, see Kelsen, '*Die Verfassung Deutschösterreichs*', *Jahrbuch des öffentlichen Rechts* (Tübingen), vol. ix, pp. 245–91.

[2] Kelsen, *Die Verfassungsgesetze der Republik Österreich* (Wien, 1919).

642 elected by the people.[1] The party therefore regarded with dis-
646 favour any of the customary devices designed to check the Chamber, such as a strong Government, a strong President, or a second Chamber. Social Democrats were equally anxious to vindicate the independence of the Chamber as against the people. Hence, they regarded such devices as the Referendum and the Initiative with suspicion. For this reason, also, they were in favour of the introduction of proportional representation with the closed list system, as they believed that these would free the members of the Chamber from any kind of dependence on their constituents. This, they hoped, would avert both the corruption of local politics and the predominance of the provincial outlook in the National Assembly, which they feared would result if this became the catspaw of local groups.[2]

These views can be clearly traced in the constitutional experiments of the first two years of the Republic. For instance, the Council of State was chosen by the National Assembly on the basis of proportional representation. The Government was thus recruited not from the ranks of one party, but from the whole body of representatives.[3] This body was, however, intended to be in all respects subordinate to the National Assembly. The three Presidents of the Council, who had equal powers, were chosen by each of the three big parties, the Christian Socialists, the Social Democrats, and the German Nationalists.[4] The elections to the Constituent Assembly in February 1919 were based on proportional representation, instead of the old majority voting arrangement.

[1] For instance, the Executive Committee, or Council of State elected by the National Assembly and entrusted by it, on 30 October, with the task of carrying on the government of the country, was deliberately made subordinate to the National Assembly, of which it was constituted the executive committee. The Council of State was, however, later given a right of suspensive veto on proposals put forward by the National Assembly. Law of 19 December 1918. St. G. Bl. Nr. 139, Article 4. Law of 14 March 1919, St. G. Bl. Nr. 179, Article 5.

[2] Renner, speech to Provincial National Assembly, 18 December 1918.

[3] 30 October 1918, St. G. Bl. Nr. 1, Article 4.

[4] Hauser, Seitz, and Dinghofer were elected by the Christian Socialists, the Social Democrats, and the German Nationalists respectively on 21 October 1918. Each held in rotating weeks the offices of President of the National Assembly, the Council of State, and what may be termed the Cabinet.

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that if municipal councils chose to elect special administrative committees, such committees must be elected on a proportional representation basis.[1]

Direct government by the people was provided for in the Austrian constitution.[2] It was not, however, intended that frequent use should be made of these provisions. Article 24, for instance, enumerating the various legislative organs of the State, makes no mention of direct legislation by the Initiative and the Referendum. Article 41, (2), provides that every proposal signed by two hundred thousand qualified voters, or by half of the qualified voters in each of three Provinces, must be submitted by the Federal Government to the National Council. It may be observed, however, that the quorum of petitioners is, relatively speaking, a very high one.[3] And it was unlikely that the second of the two conditions would ever be fulfilled, in view of the fact that co-operation between the various Provinces was, as in pre-war days, discouraged.[4]

The Referendum could only be set in motion by the National Council itself.[5]

Only in the case foreseen in Article 44, (2) (a complete revision of the constitution), was a Referendum compulsory; and even in this case the effect of the article seems problematical, since no definition of "complete revision" is provided.

Of the Provinces, only Salzburg, Tyrol, and Vorarlberg included provisions for direct democracy in their constitutions.

[1] Verdier, op. cit., p. 189. It may be noted also that when, in accordance with the Geneva Protocol of 4 October 1922, it became necessary to set up a Council of State endowed with special powers, the third protocol, dealing with this, set up a body composed of the Government and twenty-six councillors who were to be elected on a proportional representation basis.

[2] The provisions were, however, somewhat half-hearted. Most of the Social Democrats did not approve of proportional representation, fearing that it might undermine the supremacy of Parliament. The Christian Socialists, who had at first supported it warmly because of their control over the Provinces, became doubtful in proportion as the question of the proposed administrative reform, which they felt would weaken their hold on the Provinces, became actual.

[3] In Switzerland, for instance, only thirty thousand votes are needed. Swiss Constitution, Article 89.

[4] Cf. Law of 1860 with Article 107, 1920.

[5] Article 43.

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the sphere of provincial autonomy.[1] But, as the Federal State had in fact evolved from a unitary State, the word 'remain' is meaningless.

By Article 26, (2), it was laid down that the country should be divided up into constituencies within the various Provinces. Apart, however, from the fact that this constituted a recognition of the federal ideal, it is difficult to see that the Provinces derived any particular benefit from this arrangement. Article 36, providing for strict rotation among the Provinces in the office of President of the Federal Council, is of a similar character.

Article 24 announces that legislation shall be by the National Council, together with the Federal Council elected by the Provincial Councils. But in fact, as has been pointed out, the legislative power of the Federal Council was very slight indeed. The Federal Council had, for instance, no share in the appointing of the Government;[2] and it could not even set up special committees of investigation.[3]

Again, by the terms of Article 52, the Federal Council could, as the National Council, inquire into the conduct of the Government. It might be supposed that the corollary of this Article would be that, if the conduct of the Government was found to be unsatisfactory, the Federal Council could take some steps towards its removal. This, however, was not the case.[4]

There were, it is true, certain things which could not be done without the consent of the Federal Council. By Article 3, (2), for instance, it was decreed that no alterations could be made in the boundaries of the Provinces (except as provided by the Peace Treaties), except by agreement of all the Provinces concerned.[5] By Article 35, (4), it was decreed that no alteration

[1] 'Verbleibt sie im selbständigen Wirkungsbereich der Länder.' This terminology may be compared with that of the previous draft of this article, 'Die Länder . . . übertragen dem Bund', etc. The implication of these phrases is that the Provinces were originally sovereign bodies. This was certainly not the case. (Kelsen, op. cit., vol. v, p. 80.)

[2] Article 70. [3] Article 53, (1). [4] Article 74, (1).

[5] Cf. Weimar Constitution, Article 18, which empowers the State, in certain circumstances, to alter boundaries without the consent of the Provinces concerned.

642 should be made in the constitution of the Federal Council
635 without its assent. And assent required a majority vote in
646 favour from the representatives of at least four Provinces. A minority of the Provinces could thus prevent an amendment.[1]

692 Finally, by Article 132, if a Province were involved in a dispute before the Administrative Court, the case had, as a rule, to be tried by a Senate having among its members a judge who formerly belonged to the judicial or administrative service of that Province.[2]

642 But although certain actions could not be carried through
635 without the consent of the Provinces, effective precautions were taken to ensure that the Provinces should never become overpowerful.

Articles 95–120, for instance, gave the State control over the political and social structure of the Provinces. The provisions ensuring democratic government, safeguarding minority rights, and guaranteeing to the State extensive supervisory rights, guarded against the possibility of the growth of a strong, united opposition to the central Government from reactionary parties in the Provinces. The extent to which State control over the Provinces went may be seen by Article 100, which provided that a Provincial Council could be dissolved by the Government, if the consent of the Federal Council was obtained.[3] The Article provides an example of the spirit of compromise which pervades the Austrian constitution, for, while the federal principle is undermined by the provision that a Provincial Assembly can be dissolved by a State organ, it is safeguarded by the provision that the assent of the highest federal organ shall be necessary for such a dissolution.

642 The Administrative and the Constitutional Courts were
635 clearly intended as State organs (although, as has been pointed
692

[1] The provisions of this article should have been applied also to Article 34 (dealing with representation of the Provinces in the *Bundresat*). Originally Articles 34 and 35 were one. When they were separated the constitutional committee omitted to make Article 35, (4), apply to both of them, though it was clearly far more important that it should apply to Article 34.

[2] Cf. with provisions for trying cases before the Permanent Court of International Justice (Statute of the Court, Article 31).

[3] The consenting vote, however, required a quorum of one-half of the members, and a two-thirds majority.

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as the result of a Referendum this is noted.) No mention is made of the co-operation of the Federal Council. Laws are dated in the Federal Law Book from the day of their third reading by the National Council.

(iii) *The National Council*

The Austrian State was reorganized by the constitution of 1920 as a democratic, federal, and parliamentary republic. The pivot of the whole political structure was the National Council.

The sovereignty of the National Council was ensured by the almost complete absence of provisions for its control either by the people who elected it, the Federal Council, the Government, or the President.

From the first of these possible controlling bodies the National Council was virtually divorced after it had been elected. It was specifically laid down in Article 56 that members should not be bound by instructions. The people could, it is true, introduce legislation directly, by the device of the Initiative. They were not, however, encouraged to do so; the numbers of supporters required for an Initiative motion was, as has been pointed out, comparatively high; nor was the National Council bound to pass such bills. Similarly, proposals involving a complete revision of the federal constitution had to be submitted to a Referendum. But no attempt was made to define what was meant by a 'complete revision'; and again, it was not stated that the National Council was bound by the result of such a Referendum. Other measures only had to be submitted to a Referendum if the National Council so decided.[1] The National Council could only be dissolved before the end of its four-year term of office by its own decree. If it was so dissolved, it had to be reassembled by its President, if a quarter of its members so requested.[2]

But, if the National Council was not controlled by its electors, still less was it controlled by the Federal Council. The Federal Council had, as has been pointed out, in a few

[1] Article 43. [2] Article 28.

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isolated and comparatively unimportant instances an absolute veto; in the majority of cases it had a suspensive veto,[1] and in a small number of extremely important cases, concerned with financial matters, it had no veto at all.[2] It had little control over the Government. It could, as the National Council, inquire into the Government's conduct of business.[3] But it could not, by a withdrawal of confidence, cause the dismissal of the Government.[4] In any case, it was possible for the National Council to exercise an indirect control over its composition, because, owing to a mistake in drafting, the Federal Council did not possess an absolute veto right in regard to alterations to Article 34, dealing with representation of the Provinces in the Federal Council. Provided that the requisite majority could be obtained in the Federal Council, the Government, which was the tool of the National Council, could dissolve a Provincial Council and thereby remove its representatives from the Upper House.

The President, whose functions were not intended to be other than decorative, was elected by the Federal Assembly;[5] the National Council could take the initiative in calling the Federal Assembly together to impeach him.[6] He was the servant of the National Council, not its master.

But the sovereignty of the National Council comes to the foremost clearly in the provisions made to ensure its control over the Government. Article 70, (1), decrees that the Government shall be chosen by the National Council, voting upon the proposal laid before it by the Chief Committee.[7]

[1] Article 42, (4). [2] Article 42, (5). [3] Article 52
[4] Article 74, (1). [5] Article 60. [6] Article 63, (2).

[7] 'Die Bundesregierung wird vom Nationalrat in namentlicher Abstimmung auf einen vom Hauptausschuss zu erstattenden Gesamtvorschlag gewählt.' This article might, however, suggest that the National Council had a more absolute control over the personnel of the Government than was actually the case. By Article 72, (2), for instance, it was stipulated that the list of ministers should be countersigned by the new Chancellor. Therefore, in fact, this meant that the Chancellor chose his own colleagues although his choice was subject to the approval of the National Council. Kelsen remarks: 'Die . . . Bestimmung, dass der neugewählte Bundeskanzler die Bestellungsurkunden aller Mitglieder der Regierung gegenzuzeichnen hat, hat praktisch die grosse Bedeutung, dass kein Mitglied des neuen Kabinettes gegen oder ohne den Willen des präsumtiven Bundeskanzlers berufen werden kann.' (*Die Verfassungsgesetze der Republik Österreich*, vol. v, p. 168.)

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642 646 Article 70, (3), provided for the eventuality of a Government resigning while the National Council was not in session. In this case, a new Government had to be chosen provisionally by the Chief Committee. As soon as the National Council reassembled, the election of the Government had to take place as usual.[1]

Members of the Federal Government were responsible to the National Council while in office,[2] and impeachment proceedings could be brought against them.[3] The Government could be questioned on all matters relating to the execution of the laws by members of both Houses. Both Houses could express their wishes in regard to the exercise of the executive power, by resolution.[4] And it was even laid down by Article 55 that in addition laws could be introduced providing that particular ordinances of the Government should require the assent of the Chief Committee. The presence of the Government could be demanded by either House, and by the committees.[5]

Another means of control by the National Council over the Government was the Independent Court of Audit. This court was responsible for drafting the balance-sheet of the Budget and presenting it to the National Council. It could examine the expenditure of every agency of the Federal State. It could be entrusted with the right to examine the expenditure of any enterprise in which the Federal State was financially interested.[6] And by Article 122, (1), it was expressly laid down that the Independent Court of Audit was directly responsible to the National Council.[7]

642 646 689 Finally, by Article 74, (1), it was decreed that if the National Council, by express resolution, withdrew its confidence from

[1] This provision, safeguarding the power of the National Council, had not been included in the constitution of 14 March 1919.

[2] Article 76. [3] Article 142, (2), b. [4] Article 52.

[5] Article 75. On the other hand, members of the Government could take part in debates in the National Council, the Federal Council, and the committees (except debates in the Chief Committee, to which they had to be specially invited). They had always to be heard if they wished to speak.

[6] Article 121.

[7] The president of this court was elected by the National Council on proposal of the Chief Committee, Article 122, (3). He could be dismissed by resolution of the National Council, Article 123, (2).

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the Federal Government, or from individual members of the Government, they would be thereby removed from office.[1] It was not, however, intended that this weapon should be lightly employed against a Government, for it was stipulated that such a resolution would require a quorum of half the members of the National Council. And, if one-fifth of the members so demanded, the vote could be postponed for two days.[2] The Government, apart from this somewhat meagre stipulation, had no means of protecting itself against an adverse vote by a chance coalition in the National Council, since it could not confront the National Council with the choice between continued support and a dissolution.

As has been pointed out, the National Council had practically complete control over all legislation. It had also considerable executive functions. By Article 50, political and certain other treaties required for their validity the consent of the National Council. By Article 53, it was empowered to set up by resolution Committees of Inquiry,[3] before which all public authorities were obliged to give evidence if required. By Article 54 certain executive duties were specifically made over to the National Council, such as the fixing of the prices of such federal services as railways; the fixing of the prices of monopoly goods; and the fixing of the salaries of persons employed by the State. Apart from these specified cases, it was laid down in Article 55 that the National Council should share in the executive power of the State through its Chief Committee, to which reference has already been made. Kelsen has described this body as the most important political organ of the National Council.[4] Provision had been made for its election in the constitution of 14 March 1919. Its membership had then been fixed at eleven, whereas by the constitution of 1920

[1] It may be noted that, since it was anticipated that the dismissal of an individual minister by a vote of no confidence should not necessarily involve the resignation of the whole ministry, the cabinet system was not adopted.

[2] Kelsen comments on this: 'Dass die Wirkung des Misstrauensvotums verfassungsgesetzlich ausdrücklich normiert wird, ist eine Besonderheit unserer Verfassung' (op. cit., vol. v, p. 169).

[3] Cf. with Article 34 of the German Constitution, according to which such a committee had to be set up if one-fifth of members so demanded.

[4] *Jahrbuch des öffentlichen Rechts*, vol. xi, p. 246.

642 644 647 the number of members was not specified. And the President of the National Council was no longer *ex officio* a member and Chairman of the Committee. The Chairman was now elected by the Committee itself. The Chief Committee was elected by the National Council from among its own members, on a basis of proportional representation of all parties.[1]

642 646 693 Finally, the control exercised by the National Council over the judiciary was considerable. By Article 86, (1), it was decreed that the judges should be appointed upon nomination by the Federal Government.[2] The control exercised by the National Council over the Federal Government has just been pointed out. That exercised by it over the Independent Court of Audit has also been referred to. The President and half the members of the Administrative Court were appointed by the Federal Government upon nomination by the Chief Committee.[3] The President, Vice-president, and half of the members and deputy members of the Constitutional Court were elected by the National Council.[4]

It may be said, therefore, that by the constitution of October 1920, Austria was reconstructed as a democratic, federal, and parliamentary State, the pivot of which was intended to be the National Council.

(iv) *Conclusions*

642 The chief criticism that can be levelled at the 1920 constitution is the weak position in which its provisions placed the Government, the proper authority of which was deliberately undermined, mainly because of the fear of a return to the old, too powerful rule of the executive. The fact that the right to demand a dissolution was withheld from the Government, together with the fact that, owing to the introduction of pro-

[1] It may be noted that, although the National Council exercised no direct control over the Provinces, it did exercise very considerable indirect control, through its control of the Government.

[2] With regard to this article, it may be noted that although the senates were required to produce proposals for such appointments, these proposals were not, as they were in the project of 22 November 1918, made binding on the Government.

[3] Article 135. [4] Article 147, (2).

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ties were due. The reformers of 1929 mistook effects for causes.

It was, for instance, widely felt that one of the great evils in the post-war Austrian state had been the politicizing of every department of public life.[1] This was certainly true. But it was not realized that the cause of this lay to a great extent in the constitution itself. The Government had been deliberately placed under the control of the National Council; and instead of being regarded as the executive committee of that body, it had come to be considered as a weak, but potentially dangerous, rival, whose powers must be curtailed at all costs.

The National Council possessed all the necessary constitutional means to enforce its authority. But it was itself controlled by the party leaders as, owing to the system of proportional representation and the closed list, these had almost absolute control over its members. Thus the proper organs of control—the electorate, the National Council, and the Government—had been in the hands of an irresponsible group of men, many of whom were possibly not even known to the Austrian public.[2] For twelve years the party system had thus run riot in Austria, and in consequence many people had come to believe that it was a system inherently vicious, and to advocate its supersession, and the substitution of some non-party form of organization in its stead. But in fact, different parties are simply the organized expression of differences of opinion among the electorate, and as such they are a necessary concomitant of any democratic government. Their abolition may temporarily hide such differences, but can hardly eradicate them. And, if differences cannot be voiced constitutionally, they may

[1] 'Tatsächlich ergab sich auf Grund dieser Verfassung im Verlauf der vergangenen zehn Jahre eine Ueberpolitisierung unseres gesamten Lebens, eine Diktatur des Parteiwesens, dessen Einfluss weit über den politischen Bereich hinaus greift u. so ziemlich alle Gebiete des wirtschaftlichen wie des geistigen Lebens erfasst hat. (*Neues Wiener Tageblatt*, 22 September 1929.)

[2] The disadvantages of the closed-list system were, however, beginning to be understood, and the need for a closer connection between electors and elected urged. 'Tatsächlich wurden die Volksvertreter in ihrer Überzahl nichtmehr vom Volke gewählt, sondern von den Parteiführer, den Parteisekretariaten nominiert.' (*Neues Wiener Tageblatt*, 21 September 1929.) For the same reason large electoral districts were now deprecated. In the end, however, the electoral system remained unchanged.

well find a more dangerous outlet. The parties were not the villains of the piece—but the constitution, by which they were accorded a disproportionate amount of power.

Distrust of the National Council was manifested on all sides. The parties of the right hoped to undermine its power by strengthening the office of President; the Social Democrats, by a more frequent use of the Referendum.[1] In fact, it transpired in the course of the 1929 debates on constitutional reform, that the Social Democrats had revised their views on constitutional questions almost as much as their rivals, the Christian Socialists. Renner, for instance, in the debate on the first reading, remarked that the great weakness of the 1920 constitution had been the concentration of power in the Lower House, to the exclusion of all other bodies.[2] For this reason he announced his approval of the proposals made for strengthening the position of the Government and the President.[3] It is true that Renner was very much more conservative in his views than the majority of the Social Democrats. But the party leaders as a whole were well aware that they were on the defensive, and they did not therefore show themselves averse from reasonable compromise.

One result of the over-politicizing of public life, to which attention had frequently been drawn in the past by Dr. Zimmermann, had been a tendency to multiply officials, and thus to increase the cost of government.[4] Attempts to check

[1] Their proposal was that every bill taken up by Parliament should be submitted to a Referendum if one-third of the National Council advised it, or if 300,000 electors demanded it. (See *Pester Lloyd*, 10 October 1930.)

[2] 'Das ist die erste grosse u. tragische Schwäche unserer geltenden Verfassung, dass sie nicht ein Gleichgewicht hergestellt hat unter den mehreren Trägern der staatlichen Autorität, sondern dass sie alles auf eine Karte gesetzt hat, dass sie den Staat u. seine Ordnung, seine Sicherheit u. Freiheit auf die eine Säule des allmächtigen Parlaments aufbauen wollte. . . . Die Verfassungsnovelle ist vor allem charakterisiert durch das Bemühen, das alte demokratische Ideal der Gewalttrennung durchzuführen.' (*Stenographisches Protokoll*, 102 Sitzung, 22 October 1929.)

[3] 'Es soll vor allem die Bundesregierung in ihrer Position gestärkt werden. Das geschieht schon dadurch, dass der Bundespräsident sie ernennt. Der vorliegende Entwurf hält die Mitte zwischen der Präsidenten-Republik u. der Parlamentarischen-Republik; ich glaube eine gesunde u. richtige Mitte' (op. cit.).

[4] *Neues Wiener Abendblatt*, 18 September 1929. Schober pointed out that Austria, a country of seven million persons, had seven hundred members of legislative bodies, (*Reichspost*, 20 October 1929.)

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642 643 adopted was, however, not unexceptionable. Election was compulsory and, if no candidate succeeded in gaining an absolute majority in the first count, only the two parties having the largest number of votes in the first count could nominate candidates for the second. Since these could then nominate new candidates there was nothing to prevent parties that had gained a large number of votes, by putting up moderate candidates, from confronting the people with extremists in the second count.[1]

642 643 646 The power of the President over the Government and the National Council was considerable. The President, and not the Chief Committee, now appointed the former, although the confidence of the National Council was still necessary.[2] The President could dissolve the National Council, with the assent of the Government. But he could only do this once for the same reason; and fresh elections had to be held within ninety days.[3] During this period, however, the Government could carry on in virtue of its right to issue ordinances.[4]

In general, the principle of parliamentary rule was much weakened by the fact that it was now assumed that Parliament was not a permanent body. The President had to assemble it in the spring and the autumn. It was laid down that the spring sitting should last for at least two months, but that it could not continue after 15 June. The autumn session had to be for at least four months, but it could not begin until after 15 October.[5] It was envisaged as a possibility, therefore, that the National Council would not be in session for more than six months of the year. Committees could, however, be entrusted with carrying on the work when it was not in session.[6] And it was provided that it should be reassembled should a third of the Upper or Lower House so demand. In this case, it had to be summoned within two weeks for an extraordinary session.[7]

The power of the National Council over the budget also

[1] The original proposal had been that the President should be directly elected, but that the verdict might be revised by the two legislative chambers. (*The Times*, 15 October 1929.)

[2] Articles 70, (2), and 74, (1). [3] Article 29.

[4] Article 18, (3). [5] Article 28, (1). [6] Article 28, (4).

[7] Article 28, (2).

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declined. The original proposal had been that, if the budget were not voted at the right time, the provisions of the previous year should hold good. Eventually, however, this period was limited to eight weeks.[1]

The corollary of these limitations placed upon the power of the hitherto omnipotent National Council was the legislative power now entrusted to the President. Kelsen remarks, for instance, on the importance of the new ordinance right.[2] This innovation was regarded with the deepest suspicion by the Social Democrats, who saw in it an attempt to resuscitate the famous Paragraph 14 of Imperial days. Schober, however, solemnly asserted that nothing of this kind was intended. He pointed out that it had been found necessary to entrust the executive with the right to issue ordinances in certain circumstances in most other democratic countries, as France, England, Ireland, Czechoslovakia, etc. The Social Democrats, however, wanted this power to be made over to the Chief Committee and liberal opinion disapproved strongly of the whole arrangement.[3] Eventually, a compromise was reached by which all ordinances issued by the President required the immediate assent of a sub-committee of the Chief Committee, and the assent, within a month, of the National Council, which had to be summoned to consider them within eight days.[4] Ordinances could not change constitutional laws, impose permanent financial burdens, or alienate State property. It was further provided that ordinances should only be issued in

[1] Article 51, (3).

[2] Kelsen, *Jahrbuch des öffentlichen Rechts*, vol. xviii, p. 141: 'Im innigsten Zusammenhang mit der Einschränkung der Parlamentsfunktion steht die sehr einschneidende Reform, die das Verordnungsrecht einführt.'

[3] *Frankfurter Zeitung*, 10 October 1929: 'Die Minorität würde so stets unter Druck gesetzt werden können, dass Gesetzentwürfe, die sie nicht schnell annehmen lässt, durch Notverordnung erlassen werden.'

[4] Article 18, (3) and (4). Kelsen considers, however, that this last provision would not apply to ordinances passed during the period of ninety days during which it was legal for the President and Government to rule without Parliament. He admits, however, that 'die Verpflichtung der Regierung, eine von ihr erlassene Notverordnung dem Parlament unverzüglich vorzulegen, bedeutet eine wichtige Einschränkung dieses ausserparlamentarischen Gesetzgebungsrechtes'. (*Jahrbuch des öffentlichen Rechts*, vol. xviii, p. 142.)

cases of necessity and for purposes of defence.[1] But, as Kelsen points out, this safeguard was worthless from a legal point of view.[2]

The President was also made head of the army.[3] But this was rather a change of emphasis than an actual increase in presidential power. It may be noted, however, that the reforms gave more power to the army. Hitherto it had only been empowered to restore order if so requested by the civil powers. It was now permitted to step in, in case of emergency, without being so requested.[4]

Another marked tendency in the 1929 reforms was towards centralization. But although it was coming to be realized with increasing clearness in responsible circles that Austria could not afford the luxury of provincialism—either from a moral or from an economic standpoint—yet as Kelsen had pointed out two years earlier, this tendency was, if anything, gaining ground,[5] in spite of the increased centralization introduced by the 1925 reforms, and in spite of the general realization that provincialism must make the possibility of an *Anschluss* ever more remote.

It was also intended to introduce changes as regards the organization of the Upper House, which, it was generally admitted, had not worked satisfactorily.[6] The *Heimwehr*, the *Landbund*,[7] and certain other right-wing sections of Christian Socialist opinion were anxious to introduce the corporative principle, either wholly or in part. And a proposal was for a time considered by which the nine Provinces were to be repre-

[1] Article 18, (3).

[2] 'Da das Vorhandensein dieser Umstände zu beurteilen, dem Ermessen der verordnenden Instanz selbst überlassen bleibt, und dieses Ermessen auch von dem seiner Überprüfung zuständigen Gericht—dem Verfassungsgerichtshof—nicht wirksam überprüft werden kann.' (Op. cit., p. 141.)

[3] Article 80, (1). [4] Article 70, (2).

[5] 'Durch die politische u. staatsrechtliche Entwickelung seit dem Umsturz hat sich die Stellung der Länder so gekräftigt, haben sich die durch die Landesregierungen repräsentierten politischen Machtcentren in den ehemaligen österreichischen Krönlandern so sehr verwurzelt, dass an eine Umwandlung Österreichs in einen Einheitsstaat ernstlich nicht mehr zu denken ist.' (*Frankfurter Zeitung*, 4 April 1927.)

[6] Seipel, article in *Reichspost*, 19 October 1929.

[7] *Die Stunde*, 21 September 1929.

sented by eighteen members, while thirty-six members should represent the professions and industries.[1] However, as Schober pointed out, a reform of such magnitude could not be hurried through in a few days—particularly as it would mean a further increase in the number of officials.[2] It was anticipated, however, that another constitutional law would be passed dealing with this matter. In the meantime the composition of the Federal Council remained unchanged.[3]

A further step towards centralization was taken by extending the control of the Court of Audit not only over provincial finances but over districts which comprised more than twenty thousand inhabitants.[4] Hitherto the control of the Court of Audit had only been exercised in those Provinces which had not independent control organs of their own.[5] This change brought the finances of the city of Vienna under the control of the Court of Audit, and in consequence was bitterly opposed by the Social Democrats.

The right of appeal in matters dealing with provincial administration was somewhat extended.

The powers of the State police were considerably extended at the expense of those of the Provinces.[6] As a result of this legislation, the special municipal police force instituted in Vienna after the 1927 riots had to be disbanded. All State police were to be given an autonomous ordinance right, in virtue of which they could, under special circumstances, issue ordinances, which would have temporary validity, provided

[1] *The Times*, 15 October 1929. [2] *Reichspost*, 20 October 1929.

[3] But although no new legislation was introduced, a later paragraph referred to members of the Upper House as enjoying immunity in their capacity as members of Provincial Councils (Article 58, (1)). But the old Federal Council members, although they had to be eligible for election, could not themselves be members of local assemblies (Article 35, (2), 1920).

[4] Smaller districts could be included if the Provincial Government concerned so requested (Article 127).

B. G. Bl. Nr. 268, 30 July 1925, Article 127, (1).

[6] Kelsen, *Jahrbuch des öffentlichen Rechts*, vol. xviii, p. 132. 'So gut wie die gesamte Sicherheitspolizei ist der Zuständigkeit der Länder entzogen, und dem Bunde übertragen. Diese Monopolisierung fast des gesamten Polizeiwesens beim Bund bedeutet, wenn man beachtet, dass auch das ganze Militärwesen u. die ganze Gerichtsbarkeit von allem Anfang an beim Bund lagen—einen Grad von Zentralisation, der mit dem Typus des Bundesstaates kaum mehr vereinbar ist.'

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727 Russians had been in sole control for four months, and Western suspicion of their influence was growing. On the 19th of August a public ceremony took place that symbolized their position. Accompanied by the firing of hundreds of rockets, a memorial was unveiled in the Schwarzenbergplatz which represented a Russian soldier with flag and shield as the emblem of liberation. Though not objectionable in itself, its position in front of the beautiful Schwarzenberg Palace spoilt one of the finest city views in Europe. The Viennese resented its inartistic intrusion and called it the 'Unknown Plunderer'. One day, it is hoped, the Russians will transfer it to a more fitting site in the Prater, where the Red Army fought to free the city.

In spite of the proclamation of the 11th of September, the Western Allies wished to have three points settled before they recognized the Provisional Government. They wanted to be sure that it was a suitable government for the whole of Austria. They wanted to be certain it had the approval of the provinces. And it was necessary to settle between themselves and the Russians what the relationship of the Government to the Allied Council should be. Before the end of September the second point was established beyond doubt.

646 After the First World War a series of provincial conferences had been called to deal with the immensely difficult problems of the time. Dr. Renner had seen their value then, and he was convinced that they could make a valuable contribution again. Some senior Allied officers felt the same. So, with the approval of the Allied Council, whose permission was needed to allow the delegates to travel to Vienna, an all-party Provincial Conference was called for the 24th to the 26th of September. It was no coincidence that during the four previous days the People's Party held a provincial conference in Salzburg. Austrian opinion at the time was strongly in favour of country-wide co-operation.

The conference was held in the Provincial Chamber of Lower Austria in the Herrengasse. Leopold Figl, as Governor of the Province, greeted the assembled representatives by expressing the hope that they could prove to the Allies that

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they were worthy of directing the destiny of their country and their people themselves. He was followed by Dr. Renner, who gave a vivid description of the frustration and impotence that resulted from the division of the country. Certain differences revealed themselves in the course of the discussions. Dr. Renner himself had shown centralizing tendencies as head of the Provisional Government, and Dr. Gruber, as Governor of the Tyrol, had been inclined to take an independent line. There were problems, therefore, that had to be thrashed out. But the conference, on the whole, was a great demonstration of unity. Dr. Heinrich Gleissner, the past and future Governor of Upper Austria, set the tone that prevailed and expressed the feelings of the provincial representatives in a statesman-like speech, when he spoke of the sense of home-coming they had all experienced as they climbed the steps leading into the Vienna Town Hall.

There were four immediate results. The Government was broadened to include representatives of the provinces, the most significant appointment being that of Dr. Gruber, as Under-Secretary in charge of External Affairs. A legal commission of the Provincial Conference was appointed to consider the suitability of the Provisional Government's laws for the provinces. The outlines of an economic programme were drawn up; and a recommendation was made that general elections should be held in November.

Two more Provincial Conferences were held during October, at which the provincial delegates made further important decisions. The laws and ordinances passed by the Provisional Government were accepted. It was agreed that the legislative powers of the provincial chambers under the 1929 constitution should be restored. Recommendations were made regarding procedure at the coming elections, and the exclusion of former National Socialists was proposed. The Government's economic plans were endorsed, including an appeal for help to UNRRA. Most important of all was the moral support these further meetings gave the Chancellor in his vital negotiations with the Allied Council.

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to the Russians, and he had shown the Russians to Central Europe. The first error could be rectified by ensuring that the occupying troops did not stay long enough in Central Europe to feel at home. But the results of the second mistake will take many years to eradicate.

In Austria, in the spring of 1945, the Russians had the game in their hands, and from then on they played it very badly. A great opportunity was missed, as in the rest of the world, where a moderate and enlightened Communist policy, following Russia's heroic struggle against Germany, would have been irresistibly attractive to millions.

The results of the election became known on the 24th of November. Two days later the Provisional Government resigned. The Political Cabinet Council accepted its resignation, entrusted it with the temporary administration of public business, and at the same time called on the Austrian People's Party to nominate someone to form a government. The choice fell on Leopold Figl, who had for some months been Chairman of the party and, like Dr. Dollfuss, owed his influence in the party and the country to his work for the *Bauernbund*. During the election campaign all three parties had declared that they were in favour of further collaboration after the election. A Coalition Government was therefore formed in which there were eight representatives of the People's Party, six Socialists, and one Communist. The approval of the Allied Council was given on the 18th of December.

On the following day the new National Assembly met for the first time, and Dr. Renner presented a report on the work of the Provisional Government. At the same time, the Second Chamber, known as the Federal Assembly, which had been elected by the Provincial Chambers according to the constitution, held its first sitting. On the 20th of December the two Houses met in joint session and elected Dr. Renner Federal President by 204 votes out of 205, one member abstaining. The new President's first duty was to swear in the members of the new Government.

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665 [666] constituencies. The elector does not vote for the man of his choice but for a list of candidates selected by the leaders of his party. There is therefore no personal contact between the member of parliament and his constituents, and even the politically minded citizen usually does not know the names of the members who represent him. Once in Parliament the member feels himself to be less a representative of the electorate than an official of his party, and the discipline of the party parliamentary club is strong. The club determines how he shall vote and sometimes how he shall speak. The opportunity for the individual to influence the democratic process outside the club is small, and the occasions are very rare when a parliamentary debate develops along lines unforeseen and unplanned by the party organizers.

• 664 The impersonal nature of the legislative procedure is increased by the rule requiring certain draft laws to be referred, before submission to Parliament, to Chambers representing sectional interests of the community, such as the Chamber of Agriculture and the Chamber of Workers and Employees, in which party interests are often strong. In the case of Bills wholeheartedly approved by the interests concerned, the subsequent parliamentary proceedings tend to lose in significance.

665 The large part played by the party machines in the whole process of government accentuates political antagonism. Individuals have a greater capacity for compromise than organizations, and under the Austrian system the scope given to the human element is reduced to a minimum.

This state of affairs contributed much to the intensity and bitterness of the political conflict between the Wars. The opposing parties, with their utterly different ideologies, were so taken up with the trial of strength between them that they mistook the means for the end. They forgot that the true purpose of the democratic process is to find something out and, having come as near as possible to discovering the best course, to act upon it. Such qualities as humour, good nature, friendliness, and a capacity to live and let live make Austrians natural democrats. Yet these very qualities were squeezed

those of Austria as of July 20, 1945. This was followed by the "Beamtenüberleitungs- und Staatsbürgerschaftsüberleitungsgesetz" (i.e., a law re-establishing the Austrian status of employees and citizens), the reorganization of municipal law as well as the "Nationalsozialistengesetz," known as NS, the law prohibiting national-socialism (Verbotsgesetz 1945 and the Wirtschaftssäuberungsgesetz). 642 727

Following the arrangement agreed upon by the powers, Austria was divided into four occupation zones and their divisioning settled during August, 1945. The supreme occupation and control authority is the Allied Commission for Austria in Vienna which retained a number of sovereign rights, but which little by little after 1946 transferred substantial shares of authority to the Austrian Federal Government. 727 631 642

At the Potsdam Conference (protocol of August 2, 1945) the powers, examining the question of extending the executive power of the provisional government (Dr. Renner) which up to then covered only the Russian occupation zone, recommended the extension of this power to cover all Austria. 728

In the federal provinces, meanwhile, provisional provincial governments were established and the federal provinces constituted, permitting the functioning of a provincial legislature within the jurisdiction of the constitution of 1929. At the same time the reestablishement of the Verfassungs- und Verwaltungsgerichtshof (i.e., a constitutional court) was prepared. On October 20, 1945, the Allied Commission for Austria finally authorized the provisional federal government, to enact laws for all of Austria (which, however, first had to be submitted to the Allied Commission for approval). 631

The elections of November 25, 1945, which had been arranged by the election proclamation of the provisional government, brought about the legalization of the endeavors of the provisional government, which resigned on November 28, 1945. 666 642

1945 Election: Tally of Votes and Seats

ÖVP (Austrian Peoples Party)	1,588,444 votes	85 seats	666
SPÖ (Socialist Party)	1,428,441 votes	76 seats	646
KPÖ (Communist Party)	174,387 votes	4 seats	
	3,191,272 votes	165 seats	